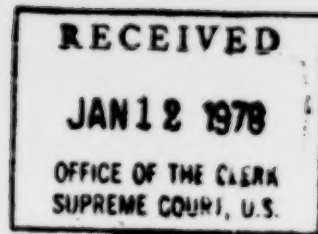


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FOR ARGUMENT

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1977



No. 76-6942

ENSIO RUBEN LAKESIDE,

Petitioner,

v.

OREGON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OREGON

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

CITATION TO OPINION BELOW

See Petitioner's Opening Brief

JURISDICTION

See Petitioner's Opening Brief

QUESTION PRESENTED

Is it a violation of the Self-Incrimination Clause of the Fifth Amendment to the United States Constitution and a violation of a defendant's Right to Counsel, guaranteed by the Sixth Amendment to the United States Constitution, for a trial court to comment on a defendant's failure to testify at his trial, by giving a jury instruction concerning this fact, after a defendant has made a timely objection to the giving of the instruction

prior to the charge to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

See Petitioner's Opening Brief

STATEMENT OF FACTS

See Petitioner's Opening Brief

ARGUMENT

Petitioner alleges that the trial court violated the Fifth and Sixth Amendments to the United States Constitution by giving a jury instruction concerning petitioner's failure to testify over objection. On page nine of it's brief, Respondent states:

"...As petitioner acknowledged in his petition for rehearing in the Oregon Supreme Court (App. 27-28), he did not make this claim in his brief in the state appellate courts, but urged it for the first time on oral argument before the Oregon Court of Appeals. Neither that court nor the Oregon Supreme Court specifically addressed this claim, possibly because of the courts' rules against noticing contentions not fairly raised in the trial court and set forth in the briefs of the parties. Cf. State v. Hickmann, 273 Or 358, 540 P2d 1406 (1975). For this reason, we do not concede that petitioner's Sixth Amendment claim is properly before this Court..."

Petitioner contends that his Sixth Amendment claim is properly before this Court. Petitioner orally notified respondent that he intended to present this argument prior to oral argument in the Oregon Court of Appeals. (App. 28)

The Oregon Court of Appeals obviously considered petitioner's Sixth Amendment claim that the trial court illegally interfered with petitioner's trial strategy by giving the "failure to testify" instruction over objection and, though not specifically mentioning the Sixth Amendment, the "trial strategy" argument

clearly formed the basis for it's decision:

"...The defendant, however insists that giving the instruction over his objection unjustifiably interfered with his trial strategy, i.e., to avoid mention of his failure to testify.

* * *

"Such a rule allows defense counsel full latitude in matters of trial strategy..." (App. 7)

The Oregon Supreme Court, in granting the respondent's Petition for Review, informed the parties that the Oregon Supreme Court would consider the following questions when the issue was argued before it:

"1) Whether it is reversible error for the trial court to give an instruction, over a criminal defendant's timely objection, that no inference or presumption affecting guilt or innocence arises from that defendant's failure to take the stand during the trial;

"2) The basis for such a rule." (App. 27)

The Oregon Supreme Court did not limit it's inquiry to the Fifth Amendment, but asked for any basis for a rule requiring reversal if the instruction was given over objection.

CONCLUSION

Petitioner's Sixth Amendment claim is properly before the Court.

Respectfully submitted,



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